84-1906

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

Office - Supreme Court, U.S.
FILED
JUN 4 1985
ALEXANDER L. STEVAS,
CLERK

STATE OF ALABAMA,

Petitioner

v.

JAMES HARVEY CALLAHAN,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA SURPREME COURT
AND
THE ALABAMA COURT OF CRIMINAL APPEALS

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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

Did the Alabama Supreme Court seriously misconstrue and misapply this Court's recent decision in Oregon v. Elstad, thereby severely limiting the scope of the rule announced in Elstad?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming Respondent's conviction and sentence is not reported, but is reproduced as Appendix A.[1]

2. The opinion of the Alabama Supreme Court reversing Respondent's conviction is not reported, but is reproduced as Appendix B. The extension of that opinion on application for rehearing is not reported, but is reproduced as Appendix C.

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[1]The appendix to this petition is separately bound pursuant to Rule 21.1(k).

JURISDICTION

The judgment of the Alabama Supreme Court which is sought to be reviewed was rendered on F bruary 8, 1985. See Appendix B. Petitioner's timely application for rehearing was denied and the original opinion extended on April 5, 1985. See Appendix C. This petition is filed within sixty days of that denial, as permitted by Rule 20.4.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution:

> "... nor shall [any person] be compelled in any criminal case to be a witness against himself, ..."

STATEMENT OF THE CASE

The Facts

During the early morning hours of February 4, 1982, Respondent abducted twenty-six-year-old Rebecca Howell from a washeteria in Calhoun County, Alabama, and killed her by smothering (Appendix A, pp. 1a-8a; R. 661-666).[2] A truck, later identified as Respondent's, was seen parked at the washeteria that night, and a man driving that same truck was observed stalking a young woman resembling the victim some four blocks away (Appendix A, pp. 3a-4a). The body of Rebecca Howell was discovered about two weeks later floating in a creek

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[2]The facts recited are generally taken from the opinions in the courts below, which are reproduced in the Appendix. Reference therefore will be made to the appropriate portions of the Appendix. References to pages in the transcript will be begun by "R."

(Appendix A, p. 2a). Based upon probable cause (Appendix A, pp. 22a-24a) Respondent was arrested on February 22, 1982 (Appendix A, p. 4a). On February 22nd and 23rd Respondent was periodically questioned and made four written statements[3] (Appendix C, p. 58a). On February 24th Respondent initiated contact with investigators and offered to show them items of the victim's clothing (R. 2[illegible]6). After signing a written waiver of the Miranda rights and a written consent to accompany the investigators on this journey (R. 233-235), Respondent directed the investigators to various places in Calhoun County where he said he had taken Rebecca Howell, including his mobile home and a spot near the creek where her body had been found (Appendix A, pp. 4a-5a, 35a; Appendix C, p.63a; R.

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[3]The times and dates of these statements is not clear because they were not introduced into evidence.

224-246).[4] Respondent's admissions during the drive were consistent with admissions made by Respondent during questioning on the 23rd (R. 263-264).

Proceedings Below

Respondent was indicted on April 5, 1982, for the capital offense of murder during of a kidnapping in the first degree in violation of Code of Alabama 1975, § 13A-5-40(a)(1) (R. 601). Trial commenced on June 21, 1982 (R. 649). At trial Respondent challenged the admissibility of his statement in the course of the drive on February 24th. It was established that at least some of the admissions made by Respondent on February 24th had been made in statements made on February 23rd (R.

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[4]Respondent did not admit killing Rebecca Howell (Appendix A, p. 35a).

263-264).[5] The only testimony regarding Miranda rights given on February 23rd was that his "rights" were given to him before any questioning that day and that he waived them (R. 256). Respondent took the stand on the issue of voluntariness and testified that while in custody he had been threatened, denied access to the telephone, and induced to talk by promises of lighter treatment (R. 300-306). In response the state called five witnesses who had maintained custody over Respondent and who testified as to the voluntariness of the confessions, specifically rebutting Respondent's claims of abuse (R. 224-246, 255-262, 268, 278-280, 288-289, 293-297, 319-322, 324; Appendix A, p. 35a). The trial court then found as follows:

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[5]It was not clearly established what Respondent had admitted in which earlier statement.

> ...I don't find any substantial credible evidence that the Defendant was in any way abused or threatened or denied access to a telephone -- denied communications to anyone that he wished to communicate with or that he was in anyway forced to sign the [waiver of rights and consent to accompany the investigators]. From what's been presented I find that he did so voluntarily and apparently in full understanding and knowledge of his rights.
>
> R. 328

Thus the trial court rejected as not credible Respondent's testimony about abuses and inducements while in custody and in effect held all of the statements voluntary. Respondent was subsequently convicted (R. 649). A sentence hearing was held before the jury; after hearing the evidence and considering the aggravating and mitigating circumstances the jury recommended a sentence of death (R. 649). The trial court, after a separate hearing, agreed with the jury that the aggravating

circumstances outweighed the mitigating circumstances and sentenced Respondent to death (R. 661-672.)

On July 5, 1983, the Alabama Court of Criminal Appeals affirmed Respondent's conviction and sentence (Appendix A).

On February 8, 1985, the Alabama Supreme Court reversed the conviction. Finding that Respondent made two incriminating statements, one on February 23rd and the second on February 24th, that court held that because the state did not prove completely the Miranda warnings before the statement of the 23rd this statement was inadmissible, and that the statement of the 23rd automatically tainted the statement of the 24th under Westover v. United States, 384 U.S. 436 (1966) (Appendix B).

On March 4, 1985, this Court issued its opinion in Oregon v. Elstad, 105 S.Ct.

1285 (1985). In Elstad the Court held that where a defendant makes two statements, the first without being given the Miranda warnings and the second after waiving the Miranda rights, the first statement only renders the second inadmissible where the first was involuntary.

On application for rehearing in the present case the state argued that under Elstad, the second confession was admissible even if the Miranda predicate for the first confession was not complete because the trial court rejected the only evidence of involuntariness (Respondent's testimony of threats, denial of use of telephone, and inducements). The Alabama Supreme Court, however, refused to alter its decision. Extending its opinion, that court held in effect that Elstad only applied where the facts establishing voluntariness were undisputed, regardless

of whether the trial court had rejected as not credible the testimony suggesting coersion.

REASONS FOR GRANTING THE WRIT

The Decision Below Misconstrues and Misapplies this Court's Recent Decision in Oregon v. Elstad, in Effect Severely Limiting The Scope of Elstad.

The case presents a simple question as to the scope of this Court's recent decision in Oregon v. Elstad, 105 S.Ct. 1285 (1985). In Elstad the defendant was taken into custody at his home and briefly questioned without the benefit of Miranda warnings. The defendant made an incriminating statement. Later that day, after being transported to the police station and given his Miranda rights, the defendant made a confession. The lower appellate court held

that the first statement, inadmissible because of no Miranda warnings, tainted the second because under the facts the effect of the first confession had not dissipated by the time of the second.

This Court reversed. The Court rejected the notion that a "fruit of the poisonous tree" test, as is appropriate to Fourth Amendment cases, is appropriate here. Instead the Court held that a second confession is admissible if the facts indicate that both confessions were voluntary within the meaning of the Fifth Amendment.

In its opinion on this case the Alabama Supreme Court gave lip service to Elstad but refused to apply it. The Court pointed out that in Elstad it was undisputed that the circumstances of the first confession were uncoercive, the Alabama

court proceeded to list the various claims made by Respondent of abuse and then announced that this case was distinguishable from Elstad factually. The Alabama Supreme Court ignored the fact that the trial court, who heard all of this testimony from Respondent and the testimony of the five state witnesses who specifically disputed it, had rejected Respondent's testimony as not credible.

The effect of the Alabama Supreme Court's decision is to limit Elstad to those few cases where the facts as to voluntariness are undisputed. This holding is not supported in the language of Elstad and is clearly contrary to its intent. While it is true that in Elstad the facts regarding voluntariness were undisputed, it is certainly not unusual for this Court to choose cases to decide which are factually uncluttered so that the application of the

law to those facts will be evident to the lower courts. The correct holding of Elstad is that where the facts surrounding the first confession, as established by the trial court, the traditional finder of fact, indicate that it was voluntary, then the second confession is thereby not tainted.

The holding of the Alabama Supreme Court, coming on the very heels of Elstad, will lead to confusion regarding the type of case to which Elstad applies. Furthermore it will generate dispute over what rule should apply in those cases in which the testimony pertaining to voluntariness is in conflict. Should Elstad apply? Should the "fruit of the poisonous tree" test, presumably rejected by Elstad in this Fifth Amendment context, nevertheless be

applied? Should some other test be developed by the courts? Speculation and confusion in the lower courts can be prevented if this Court grants certiorari in this case and reverses the decision of the Alabama Supreme Court.

CONCLUSION

For the above reasons the Court should grant certiorari to decide the important federal question presented in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William D. Little, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 4th day of June, 1985, I did serve copies of this petition and the accompanying appendix on Respondent, by placing in the United States Mail, first-class postage prepaid, three copies properly addressed to the three counsels of record for Respondent as follows:

Hon. Wilford J. Lane
1330 Noble St., Suite 21
Anniston, Aabama 36201

Hon. Fred Ray Lybrand
P. O. Box 1849
Anniston, Aalabama 36202

Hon. John Thomason
P. O. Box 441
Anniston, Alabama 36202

I further certify that I have served all parties required to be served.

William D. Little

WILLIAM D. LITTLE
ASSISTANT ALABAMA
ATTORNEY GENERAL